Supreme Court, U.S.
FILED
MAR 15 2002
CLERK

No. 01-400 (11)

In The

Supreme Court of the United States

RICKY BELL, WARDEN,

Petitioner,

v.

GARY BRADFORD CONE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF OF PETITIONER

MICHAEL E. MOORE
Solicitor General
Counsel of Record

GORDON W. SMITH
Associate Solicitor General

JENNIFER L. SMITH
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 20207
Nashville, Tennessee 37202
(615) 741-3491

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

24 pp

TABLE OF CONTENTS

Page

ARGUMENT 1

I. THE STATE COURTS' APPLICATION OF *STRICKLAND*, RATHER THAN *CRONIC*, WAS NOT CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW 1

II. THE STATE COURTS' REJECTION OF CONE'S SIXTH AMENDMENT CLAIM DID NOT INVOLVE AN UNREASONABLE APPLICATION OF *STRICKLAND* 8

III. A REMAND IS UNNECESSARY BECAUSE THE REASONABLENESS OF THE STATE COURTS' APPLICATION OF *STRICKLAND* TO THE FACTS OF CONE'S CASE HAS ALREADY BEEN PRESENTED TO THE COURT OF APPEALS AND IS FAIRLY INCLUDED IN THE FIRST QUESTION PRESENTED FOR REVIEW IN THIS COURT 18

TABLE OF AUTHORITIES

Page

CASES

Blystone v. Pennsylvania, 494 U.S. 299 (1990) 17

Burger v. Kemp, 483 U.S. 776 (1987) 5, 11, 13

Chapman v. California, 386 U.S. 18 (1967) 7

Cozzolino v. State, 584 S.W.2d 765 (Tenn. 1979)....10, 11

Darden v. Wainwright, 477 U.S. 168 (1986) 5, 13, 18

Davis v. Alaska, 415 U.S. 308 (1974) 7

Delaware v. Van Arsdall, 475 U.S. 673 (1986) 7

Groseclose v. Bell, 130 F.3d 1161 (6th Cir. 1997), *cert. denied*, 523 U.S. 1132 (1998)..... 19

Herring v. New York, 422 U.S. 853 (1975)..... 12

Kimmelman v. Morrison, 477 U.S. 365 (1986).....2, 3

Lockhart v. Fretwell, 506 U.S. 364 (1993)..... 19

Powell v. Alabama, 297 U.S. 45 (1932) 6

Roe v. Flores-Ortega, 528 U.S. 470 (2000) 5, 15

Smith v. Robbins, 528 U.S. 259 (2000) 5

State v. Bane, 57 S.W.3d 411 (Tenn. 2001)..... 11

State v. Hartman, 703 S.W.2d 106 (Tenn.1985) 17

State v. Keen, 926 S.W.2d 727 (Tenn. 1996)..... 17

State v. Melson, 638 S.W.2d 342 (Tenn. 1982)..... 17

TABLE OF AUTHORITIES – Continued

Page

State v. Moore, 614 S.W.2d 348 (Tenn.1981)..... 13

State v. Pritchett, 621 S.W.2d 127 (Tenn. 1981)..... 13

State v. Workman, 667 S.W.2d 44 (Tenn. 1984)..... 13

Strickland v. Washington, 466 U.S. 668 (1984)..... *passim*

United States v. Cronic, 466 U.S. 648 (1984) ..... *passim*

Williams v. Taylor, 529 U.S. 362 (2000) 1, 5, 7, 10, 20

STATUTES

28 U.S.C. §2254(d)(1) 3, 7, 19, 20

Tenn. Code Ann. §39-2-203(c) (1982) 11

Tenn. Code Ann. §39-2-203(g) (1982) 17

ARGUMENT

I. THE STATE COURTS' APPLICATION OF *STRICKLAND*, RATHER THAN *CRONIC*, WAS NOT CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW.

Respondent argues that the state courts' failure to presume prejudice to find a violation of the Sixth Amendment right to counsel under the circumstances of this case, *i.e.*, where counsel failed to present mitigation evidence at sentencing and waived closing argument, was contrary to *United States v. Cronic*, 466 U.S. 648 (1984). (Resp. Br. 18) But in practically the next breath, he concedes that this case presents this Court with its first opportunity to consider a claim of ineffective assistance of counsel under those circumstances. (Resp. Br. 37-38) He cannot have it both ways.

In *Williams v. Taylor*, 529 U.S. 362 (2000), Justice O'Connor, writing for the majority, identified the two circumstances under which a state court decision will be "contrary to" clearly established federal law: first, if the state court arrives at a conclusion opposite to that reached by this Court on a question of law; and second, if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. *Williams*, 529 U.S. at 405-06, 412-13. The Court further explained that the state court's decision must be viewed in light of this Court's holdings, as opposed to *dicta*, as of the time of the relevant state court decision. *Id.*, 529 U.S. at 412.

When the state courts decided respondent's ineffective assistance of counsel claim in 1986 and 1987, this Court had never applied *Cronic* to presume prejudice in a

case raising deficiencies in counsel's performance at trial.[1]

Respondent argues, however, that *Strickland* left open the possibility for presumed prejudice based on the "constructive denial" of counsel, citing *Cronic* for that proposition. (Resp. Br. 21-22) But the context of the passage from *Strickland* quoted in respondent's brief gives no explanation of what "constructive denial" of counsel entails, and a subsequent passage (not quoted by respondent) indicates that the Court was referring to a situation where the government is directly responsible for the Sixth Amendment violation: "[S]uch circumstances [where prejudice may be presumed] involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent." *Strickland v. Washington*, 466 U.S. 668, 691 (1984). The Court then squarely held that "[c]onflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." *Id.*, 466 U.S. at 693. In *Kimmelman v. Morrison*, 477 U.S. 365 (1986), the Court again distinguished cases involving allegations of "actual" ineffective assistance from the "few contexts where ineffective assistance is 'presumed,' such as where counsel is either totally absent or prevented from assisting the accused during a critical stage of the proceeding . . . and where counsel is burdened by an

---

[1] *Cronic* itself expressly foreclosed such an application when it noted that "claims based on specific errors made by counsel . . . should be evaluated under the standards enunciated in [*Strickland*]." *Cronic*, 466 U.S. at 666 n. 41.

actual conflict of interest." *Kimmelman*, 477 U.S. at 381 n. 6 (citing *Cronic*).

According to respondent, *Cronic* holds that, when counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing," there is a constructive denial of counsel requiring that prejudice be presumed. (Resp. Br. 21) In essence, he suggests that *Strickland* and *Cronic* establish different rules for claims of ineffective assistance, depending on the degree of deficiency in counsel's performance, thus presenting the state courts in this case with a "choice" between competing Sixth Amendment rules for evaluating his claim.[2]

Respondent reads this Court's decisions as subjecting only "garden variety" attorney errors to evaluation under *Strickland*'s two-part test. (Resp. Br. 17) But as to those cases in which counsel's performance is "so bad that it is fundamentally equivalent to having no lawyer," respondent maintains that *Cronic* requires that a reviewing court presume prejudice without assessing the likely impact, if any, on the reliability of the proceedings. (Resp. Br. 23)

---

[2] Rather than address the reasonableness of the state courts' decision on its terms, *i.e.*, finding that counsel's performance was not deficient under *Strickland*, respondent attempts to circumvent the point by suggesting that the court of appeals' ruling on the performance prong was not fairly included in either of the questions presented in the petition for writ of certiorari. He then recasts the issue before the Court as whether prejudice should be presumed "given" counsel's deficient performance. (Resp. Br. 11-12) But the Warden's petition squarely contests the court of appeals' ruling under §2254(d)(1) that counsel's performance was deficient (Pet. 14-16), and that issue is fairly included within the first question presented.

Respondent's attempt to extract from *Cronic* a separate "rule" for assessing attorney performance is not supported by a fair reading of that decision and, as indicated above, directly contravenes *Strickland*. First, *Cronic* does not purport to modify *Strickland*'s two-part test for deciding ineffective assistance claims. To the contrary, the precise holding of *Cronic* is that the circumstances surrounding counsel's appointment in that case (separate and apart from his actual performance at trial) did not justify a presumption of prejudice. *Id.*, 466 U.S. at 666. That this holding was entirely divorced from counsel's actual performance is confirmed by the Court's subsequent instruction that, "[s]hould respondent pursue claims based on specified errors made by counsel on remand, they should be evaluated under the standards enunciated in [*Strickland*]." *Cronic*, 466 U.S. at 666 n. 41.

Properly understood, *Cronic* simply confirms *Strickland*'s rule that "actual ineffectiveness claims alleging a deficiency in attorney performance" require an affirmative showing of prejudice. *Strickland*, 466 U.S. at 693. The holding in *Strickland* was not limited, as respondent's argument seems to suggest, to claims alleging only "garden variety" deficiencies in attorney performance, as opposed to more egregious errors. Indeed, as argued by the United States, extending *Cronic*'s presumption of prejudice to claims of attorney error would effectively divorce the presumptions noted in *Strickland* and *Cronic* from their policy justification and, given *Strickland*'s recognition that there are "countless ways to provide effective assistance in any given case," would provide no guiding principle for courts to determine the degree of deficiency that would render a demonstration of prejudice under *Strickland* unnecessary. (U.S. Br. 22-23)

Amicus NACDL urges a slightly different approach, suggesting that *Cronic*'s presumption of prejudice applies in the "rare" case where "counsel let the State's case for death go unanswered" or where counsel failed to subject a capital penalty proceeding to "meaningful adversarial testing." (NACDL Br. 11) That suggestion should be rejected outright. First, such a broad reading of *Cronic* is inconsistent with the entire thrust of this Court's Sixth Amendment effective-assistance-of-counsel jurisprudence, which recognizes that the significant societal costs of upsetting a conviction are warranted only when counsel's errors have a prejudicial effect on the ability of the accused to receive a fair trial. (U.S. Br. 11) Second, such a broad reading of the *dicta* in *Cronic* conflicts with the actual holding of *Strickland*, 466 U.S. at 693, that a defendant must affirmatively prove prejudice for any "actual" ineffectiveness claims alleging deficiency in attorney performance. *Accord Roe v. Flores-Ortega*, 528 U.S. 470, 482, 484-85 (2000); *Smith v. Robbins*, 528 U.S. 259, 287 (2000); *Kimmelman*, 477 U.S. at 381. Third, NACDL's suggestions cannot be reconciled with the three decisions of this Court that have applied *Strickland* to alleged attorney deficiencies during a capital sentencing proceeding, despite the fact that counsel's alleged errors in those cases could be described as failing to make a case for life. *See Burger v. Kemp*, 483 U.S. 776, 794-95 (1987) (counsel presented no mitigation evidence at all in two sentencing hearings); *Darden v. Wainwright*, 477 U.S. 168, 184-87 (1986) (counsel relied only on a simple plea from the defendant); *Williams*, 529 U.S. at 415 (Opinion of O'Connor, J.) (consequences of counsel's failure to uncover substantial mitigation evidence "manifested itself during [counsel's] generic, unapologetic closing argument,

which provided the jury with no reasons to spare petitioner's life.").

Indeed, this case demonstrates why such a rule would be judicially unmanageable. Respondent would have *Cronic* apply even though counsel gave an opening statement and cross-examined witnesses, bringing to the jury's attention evidence making a case for life. Respondent's assertion that counsel's performance did not subject the case to "meaningful adversarial testing" essentially reduces to saying that an effort is not "meaningful" if another lawyer might have done more. Aside from swallowing the *Strickland* rule, such a proposition hardly lends itself to principled application.

Contrary to respondent's assertion, *Powell v. Alabama*, 297 U.S. 45 (1932), cannot be read to stand for the proposition that prejudice must be presumed in cases where counsel actively represents the defense but commits especially serious errors in the process. (Resp. Br. 25) *Powell* does not purport to assess counsel's performance at trial; rather, the case provides an example of state interference with counsel's ability to mount a defense when the defendants' trial began "within a few moments after counsel for the first time charged with any degree of responsibility began to represent them." *Powell*, 287 U.S. at 57-58. As the Court explained in *Cronic*, circumstances warranting a presumption of prejudice "may be present on some occasions when, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Cronic*, 466 U.S. at 659-60. By contrast, a claim alleging bad lawyering necessarily requires an examination of the entire record to determine whether counsel's

performance was, in fact, deficient. Once that examination occurs, *Cronic*'s presumption is no longer justified by the policy considerations on which it is based.

In sum, respondent's strained reading of *Cronic*, unsupported by any direct authority of this Court, does not support his contention that the state courts relied on the "wrong Sixth Amendment rule." Not only are the facts of *Cronic* materially distinguishable from this case – in that the specific claim there involved the circumstances surrounding counsel's appointment rather than specific errors by counsel – but the passage from *Cronic* on which respondent relies is, at most, *dicta* and may not function as the standard by which the state courts' decisions are properly evaluated under §2254(d)(1).[3]

As this Court made clear in *Williams*, §2254(d)(1) restricts the source of clearly established law to this Court's holdings, *Williams*, 529 U.S. at 412, and "the *Strickland* test provides sufficient guidance for resolving virtually all ineffective assistance of counsel claims." *Williams*, 529 U.S. at 391. Respondent's specific quarrels with counsel's actions at trial, *i.e.*, failure to present witnesses

---

[3] The specific passage on which respondent relies actually appears as part of the Court's enumeration of the types of circumstances in which it has previously held that prejudice to the accused was so likely that the cost of litigating the effect in a particular case is unjustified. The Court cited *Davis v. Alaska*, 415 U.S. 308 (1974), a case in which the defendant's conviction was reversed because he was denied the right to cross-examine a government witness, to illustrate a situation involving a "lack of adversarial testing" of the prosecution's case. As noted in the United States' Brief (20 n. 8), the Court later held that *Davis* did not establish a *per se* reversal rule, and that such errors were subject to a harmless error analysis under *Chapman v. California*, 386 U.S. 18 (1967). *Delaware v. Van Arsdall*, 475 U.S. 673, 683-84 (1986).

at sentencing, failure to explain the significance of a Bronze Star, failure to make an argument in closing rather than in an opening statement, are classic allegations of attorney error that the state courts properly analyzed under *Strickland*.

II. THE STATE COURTS' REJECTION OF CONE'S SIXTH AMENDMENT CLAIM DID NOT INVOLVE AN UNREASONABLE APPLICATION OF *STRICKLAND*.

Respondent argues that counsel failed in his duty in a capital sentencing hearing to present a "case for life," faulting counsel for failing to re-introduce mitigation proof that had been presented during the guilt phase and for failing to make a closing argument. He claims that these omissions must have left the jury with the impression that it "had no choice but to impose death since there was no countervailing case for life to weigh." (Resp. Br. 29)

With regard to presentation of mitigation evidence, respondent points to three specific mitigating factors not developed at the sentencing phase: (1) the effects on Cone of seeing his dead brother being retrieved from a lake at age 8; (2) the effects on Cone of his fiancée's murder in 1972; and (3) the significance of a Bronze Star and why Cone received that decoration. (Resp. Br. 30) Respondent raised none of these factors in state post-conviction proceedings as a basis for his ineffective assistance claim (Pet. App. 77-78), nor was any proof presented at that hearing establishing their effect, if any, on respondent.[4]

---

[4] In his state post-conviction appeal, Cone challenged counsel's performance regarding the presentation of mitigation evidence in the following respects: (1) failure to re-call one or both of his mental health experts; (2) failure to call various relatives to testify that Cone was a "gentle child;" (3) failure to re-call Cone's mother at sentencing to make a plea for her son's life; (4) failure to call other background witnesses; and (5) failure to introduce a letter of forgiveness from one of the victims' family members. (R. 4, Add. 2, Doc. 2, Pet. Br. 26-27) On claims two and four, respondent made no proffer of what the testimony of the various background witnesses may have entailed (J.A. 68-71, 74-77), despite a full evidentiary hearing in state court on his post-conviction claims as well as express permission from the trial judge to submit post-hearing affidavits. (R. 4, Add. 2, Doc. 1, TR 208-09)

(R. 4, Add. 2, Doc. 2, Pet. Br. 26) Indeed, respondent's argument regarding the Bronze Star is at odds with his position in state court. In his state post-conviction appeal, Cone acknowledged his counsel's success in "establishing that the defendant had earned the Bronze Star while serving in Vietnam" and did not fault counsel for lack of any further development. (*Id.*) Moreover, defense counsel explained at the post-conviction hearing that his purpose in establishing the Bronze Star through testimony of the State's own witness was to prevent a potential argument by the prosecutor that respondent "was simply a supply clerk in Vietnam and that he would not have had perhaps the exposure to heavy stress that a combat Marine or someone like that would have." (R. 4, Add. 2, Doc. 1, TR 101-02) Despite respondent's suggestion that there was some additional mitigating significance to the Bronze Star beyond the fact of its award, he cannot point to any evidence in the record that establishes any such enhanced mitigating potential.[5]

---

[5] Contrary to respondent's suggestion (Resp. Br. 47-48), mitigating evidence not developed in state post-conviction proceedings has no place in an analysis of the reasonableness of the state courts' application of clearly established law. A state

Although respondent acknowledges that proof of drug dependence and post-traumatic stress disorder arising out of his military service in Vietnam (presented in the guilt phase) is properly considered as mitigating evidence, he argues that there was more mitigation evidence available that counsel could have presented. (Resp. Br. 33) Again, however, respondent has failed to identify any evidence in the record before the state court to support his contention. Moreover, his claim that mental health evidence should have been re-introduced at the sentencing phase is undercut by his own recognition that evidence of mental illness is a potential "two-edged sword" that could actually have worked to his detriment at sentencing. (Resp. Br. 37 n. 19) Such a dilemma presents counsel with a classic tactical choice to which courts must defer under *Strickland*.

Respondent also argues that counsel's justification for not calling background witnesses, *i.e.*, to foreclose any possibility that the State would emphasize evidence of other bad acts, is not supported by Tennessee law. Citing *Cozzolino v. State*, 584 S.W.2d 765 (Tenn. 1979), respondent argues that proof of a troubled background introduced to show the origin of a defendant's criminal acts would not have "opened the door" to cross-examination about other bad acts of the respondent. (Resp. Br. 34-35) Even if *Cozzolino* stood for the proposition respondent asserts,[6]

---

court cannot be faulted for failing to factor into its analysis of a defendant's ineffective assistance claim evidence not before it. *See, e.g., Williams*, 529 U.S. at 394-96 (assessing the reasonableness of the Virginia Supreme Court's decision under *Strickland* in light of evidence presented in the Virginia trial court).

[6] Respondent simply misreads *Cozzolino*, which did not purport to establish a broad rule for the admission of specific

the state post-conviction record is devoid of any proof concerning what testimony any potential background witnesses might have offered had they been called at sentencing, much less any proof that the murders were somehow traceable to the circumstances of respondent's childhood. And, in any event, there is no question that under Tennessee law the prosecution is permitted to rebut any mitigating factors relied upon by the defense. Tenn. Code Ann. §39-2-203(c) (1982); *see also State v. Bane*, 57 S.W.3d 411, 424 (Tenn. 2001) (evidence of a defendant's family background may be rebutted by proof of other bad acts). Because respondent failed to demonstrate in state post-conviction proceedings the substance of the testimony his potential background witnesses might have given, counsel's decision not to call them must be presumed reasonable. *See, e.g., Burger*, 483 U.S. at 792 (where the record contains no evidence that potential witnesses would have offered substantial mitigating evidence if they had testified, court may not reach the conclusion that counsel's failure to call the witnesses was unreasonable). Moreover, the defense theory throughout trial was that the murders were the result of psychological damage sustained as a result of service in Vietnam, not childhood trauma.[7]

---

types of evidence at a capital sentencing hearing. It merely held that the State may not introduce evidence of other bad acts committed by the defendant in anticipation of defendant's case in mitigation. "One cannot rebut a proposition that has not been advanced." *Cozzolino*, 584 S.W.2d at 768.

[7] Trial counsel's closing argument in the guilt phase summarized that theory as follows: "Gary Cone was a normal individual, a stellar scholar, a member of a family unit before he went off to a faraway place called Vietnam. . . . But I told you something had caused a change. And I told you that we would

With regard to closing argument, respondent argues that counsel's failure to make a closing argument must have left the jury with the impression that it had no choice but to impose death and that no case for life could be made. (Resp. Br. 29-30) Citing *Herring v. New York*, 422 U.S. 853 (1975), respondent argues that it is critical to give a closing argument after all the evidence has been presented. Respondent's argument is unavailing for several reasons. First, *Herring* does not support respondent's position because that case involved a denial of closing argument, not counsel's tactical decision to waive argument – a decision that must be judged under the standards enunciated in *Strickland*. Moreover, the specific aggravating circumstances upon which the State intended to rely were known to Cone's defense team before any evidence was presented at the sentencing phase, and there was little proof introduced at sentencing to establish those aggravators beyond what had already been presented at the guilt phase. Finally, respondent's counsel actually argued in his opening statement at the sentencing phase all of the mitigating evidence presented in the guilt phase, including Cone's expression of remorse, and he had asked the jury for mercy. (J.A. 23-27) Since the jury had already heard from counsel, it is not credible to conclude that the jury "could only have inferred" from counsel's decision to waive closing argument that he agreed with the prosecutor. (Pet. App. 36) Because the prosecutor did not argue that there were no mitigating circumstances, it strains logic to suggest that the jury must have inferred from counsel's failure to respond that

---

deal with two Gary Cones. One, I submit, is this Gary Cone pictured as he was many years ago. And one that I submit is this Gary Cone pictured as he was in August of 1980." (J.A. 19-20)

there were none. Indeed, the arguments of respondent and NACDL wholly ignore the countervailing negative consequences facing the respondent had counsel given a closing argument, such as the effect of a powerful rebuttal by the more experienced prosecutor and the opportunity for the prosecutor to cure what counsel reasonably believed to be reversible error in prosecution strategy in pursuing an aggravating circumstance (one of four upon which the prosecution relied) not supported by the evidence.[8]

Respondent argues that *Strickland, Darden, Burger* and *Williams* are distinguishable from this case because, although counsel in those cases failed to present mitigating proof, they did not also waive closing argument.

---

[8] Although respondent takes issue with counsel's decision to allow the State to argue for an invalid aggravating circumstance in hopes of a reversal (Resp. Br. 35), counsel's strategy was not unfounded. Just as counsel predicted, on appeal, the Tennessee Supreme Court in fact held that the jury improperly relied on one of the four aggravators returned, but concluded that the error was harmless. (Pet. App. 98-99) At the time of Cone's trial, however, the Tennessee Supreme Court had not previously applied a harmless error analysis in a case where a death sentence was based, in part, on an invalid aggravating circumstance. For example, in *State v. Pritchett*, 621 S.W.2d 127 (Tenn. 1981), the court reversed a death sentence where the evidence was insufficient to support one of two aggravating circumstances. Likewise, in *State v. Moore*, 614 S.W.2d 348, 351 (Tenn.1981), the court overturned the defendant's death sentence and remanded for re-sentencing where one of the aggravating circumstances returned by the jury was held to be invalid. It was not until *State v. Workman*, 667 S.W.2d 44 (Tenn. 1984), decided after respondent's trial, that the Tennessee Supreme Court applied a harmless error analysis to a case where the jury erred as to one aggravating circumstance, but others were clearly established. Counsel cannot be faulted for failing to anticipate that change in Tennessee law.

(Resp. Br. 38) First, respondent's counsel argued the existence of mitigating circumstances and asked for simple mercy, just as counsel did in the above-cited cases. (J.A. 23-27) The only difference between what occurred in those cases and in this case is that respondent's counsel did so at the beginning of the sentencing phase instead of the end. Counsel's opening statement concerning mitigation and his plea for mercy was still fresh in the jury's mind when it retired to deliberate. Sentencing phase opening statements were delivered at approximately 12:07 p.m. (R. 4, Add. 1, Doc. 1, TR 2110) The jury left the courtroom to deliberate at approximately 3:05 p.m. that same day. (R. 4, Add. 1, Doc. 1, TR 2150)

Respondent articulates no principled basis for creating a special rule for the waiver of closing argument at a capital sentencing hearing. In essence, respondent urges this Court to hold that a defendant's Sixth Amendment rights are violated unless, at a minimum, counsel in a capital sentencing hearing gives a closing argument to ask the jury for mercy. But such a rule would require this Court to repudiate its observation in *Strickland* that

> [n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. . . . There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Strickland, 466 U.S. at 688-90. *See also Flores-Ortega*, 528 U.S. at 481 (rejecting *per se* rules for counsel's performance as inconsistent with *Strickland*'s admonition against imposing "mechanical rules on counsel" with respect to reasonable strategic choices).

That even the best lawyers may disagree on how best to defend a particular case is vividly illustrated by the testimony of respondent's own experts in the state post-conviction proceeding, both of whom declined to opine that counsel's decision to waive closing argument fell below the standard of competence expected of defense counsel in criminal cases. One of them, qualified as an expert in criminal defense tactics, testified for the respondent that he could not say whether counsel's reliance on his opening statement at sentencing in lieu of a closing argument was outside the range of competence. "I would [make a closing], but in all fairness to Mr. Dice, I can't say that my decision is the only right decision." (R. 4, Add. 2, Doc. 1, TR 78) Respondent's other expert, qualified in the defense of capital cases in Tennessee, testified that he had waived closing on several occasions for the same reason advanced by Cone's trial counsel, *i.e.*, to prevent Assistant District Attorney Strother from delivering a devastating closing:[9]

> I have on prior occasions, on several prior occasions, waived final argument in a criminal case. I consider it to be a tactical decision on my part . . . I have done it – specifically in cases involving Mr. Strother, deliberately. . . . Mr. Strother is – they're both good lawyers. Mr.

---

[9] Although the expert testified that his own waivers had occurred in non-capital cases, there is nothing in his testimony to suggest that such a tactical maneuver would never be appropriate in a capital case.

> Strother is very good at giving – if you leave him too much room in which to operate, he'll do a very effective job on his closing argument, I assure you. He's done it many, many times. I have specifically waived final argument in cases in which he has been involved, and in my judgment, successfully by the way.

(R. 4, Add. 2, Doc. 1, TR 183) When asked whether the opening statement made by respondent's counsel would suffice as a closing argument in the penalty phase of a capital trial, the expert responded that he was "not prepared really to say that it does or does not." (R. 4, Add. 2, Doc. 1, TR 184)

As a practical matter, counsel had nothing to add to his opening statement by way of a closing argument. He had already informed the jury of reliance on the guilt-phase mitigating evidence concerning Cone's mental status and drug dependence, and he had asked for mercy on behalf of his client. In addition, he had emphasized during his opening Cone's remorse over the murders. Indeed, respondent does not identify any particular point that should have been made to the jury in a closing argument that had not already been made just three hours earlier in counsel's opening statement. The unspeakably brutal nature of Cone's crimes foreclosed any argument that anyone could have been justified in committing them. There was no "residual doubt" evidence to suggest that Cone was not the perpetrator. Moreover, the jury had rather emphatically rejected Cone's mental health defense by returning its guilt phase verdict after only an hour of deliberation. (R. 4, Add. 2, Doc. 1, TR 156) The evidence of three of the four aggravating circumstances upon which the State relied was overwhelming and could not be credibly challenged. And counsel was understandably reluctant to argue that the

jury should not rely on the fourth aggravating circumstance, since he believed (not without reason under Tennessee case law at the time) that a jury verdict based on that aggravating circumstance would be subject to automatic reversal on appeal.

Notwithstanding these facts, respondent asserts that "[t]here is no professionally acceptable reason to fail to make a case for life even if for no other reason than to ask for mercy." (Resp. Br. 41) Respondent's argument is premised on the assumption that mercy *per se* is a sufficient basis for imposing life. But under Tennessee's sentencing scheme, the jury *must* return a verdict of death if it finds that at least one aggravating circumstance exists and that there are no countervailing mitigating circumstances. Tenn. Code Ann. §39-2-203(g) (1982). Respondent's jury was specifically instructed that "if you unanimously determine that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proven by the state beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence *shall* be death." (J.A. 57) (emphasis added)[10]

Moreover, the Tennessee Supreme Court has upheld a trial court's refusal to give a "mercy" instruction. *State v. Melson*, 638 S.W.2d 342, 366 (Tenn. 1982); *see also State v. Hartman*, 703 S.W.2d 106, 119 (Tenn.1985) (trial courts not required to give charge on mercy). Because mercy divorced from mitigating circumstances is legally irrelevant in the capital sentencing calculus under Tennessee

---

[10] This Court upheld the constitutionality of such an instruction in *Blystone v. Pennsylvania*, 494 U.S. 299 (1990). *See State v. Keen*, 926 S.W.2d 727 (Tenn. 1996) (applying *Blystone's* rule to Tennessee's capital sentencing scheme).

law, a lawyer surely does not fail to act reasonably by not making such an argument.[11]

In *Strickland*, this Court instructed that courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. at 689. The Tennessee courts fully understood that instruction and reasonably applied *Strickland* to find that respondent received constitutionally effective assistance at his capital sentencing hearing. The state courts' decisions are supported by the record, including the testimony of respondent's own experts. Despite respondent's attempt to re-frame the issue wholly in terms of prejudice, the state courts reasonably applied *Strickland* and *Darden* to find that counsel's failure to present mitigating evidence at sentencing and waiver of closing argument were legitimate tactical decisions.

III. A REMAND IS UNNECESSARY BECAUSE THE REASONABLENESS OF THE STATE COURTS' APPLICATION OF *STRICKLAND* TO THE FACTS OF CONE'S CASE HAS ALREADY BEEN PRESENTED TO THE COURT OF APPEALS AND IS FAIRLY INCLUDED IN THE FIRST QUESTION PRESENTED FOR REVIEW IN THIS COURT.

Respondent argues that, if this Court determines that the court of appeals erred in granting habeas relief under *Cronic*, it should remand the case to that court for consideration of Cone's claims under the two-prong test of

[11] Moreover, if counsel had made a closing argument as respondent suggests, "for no other reason than to ask for mercy," he may well have been faulted for leaving the jury with the impression that he lacked confidence in the strength of the mitigating evidence.

Strickland. He contends that neither of the questions presented in the petition for writ of certiorari fairly include the Sixth Circuit's proper application of *Strickland* to the facts of his case. (Resp. Br. 44-45) Alternatively, he argues that a remand is necessary to address the district court's alleged erroneous application of *Lockhart v. Fretwell*, 506 U.S. 364 (1993), in its assessment of respondent's ineffective assistance claim. (Resp. Br. 45-46) The fallacy of both of these arguments is that they rest on the assumption that the federal courts' application of *Strickland* (or *Cronic*) to the facts of respondent's case is at issue. But the question is not whether the federal courts properly applied this Court's Sixth Amendment jurisprudence to resolve Cone's claim on the merits, but whether the state courts' adjudication of respondent's ineffective assistance claim was "contrary to, or involved an unreasonable application of, clearly established Federal law" under §2254(d)(1).

The Warden's petition squarely contests the court of appeals' ruling that counsel's performance was deficient (Pet. 14-16), and that issue is fairly included in the first question presented. The petition directly challenges the Sixth Circuit's decision granting habeas relief on Cone's ineffective assistance of counsel claim in view of the restrictions upon its authority imposed by §2254(d)(1), and it therefore necessarily raises the question whether the state courts' adjudication of Cone's claim was either contrary to or involved an unreasonable application of *Strickland* in any of its dimensions. Just as clearly, the district court's treatment of the issue is beside the point (Resp. Br. 45-46), since appellate review of that court's summary disposition of respondent's habeas claim is *de novo*. *Groseclose v. Bell*, 130 F.3d 1161, 1163 (6th Cir. 1997), *cert. denied*, 523 U.S. 1132 (1998).

Finally, nothing will be gained by remanding the case to the court of appeals with instructions to perform the analysis required by §2254(d)(1). That court's outright rejection of the state courts' determination of respondent's claim makes unmistakably clear its view of the state courts' decision. Moreover, the court of appeals had the benefit of this Court's decision in *Williams v. Taylor* when it decided this case and, thus, has already considered and rejected the Warden's contention that §2254(d)(1), as construed by *Williams*, forecloses habeas relief in the circumstances of this case. All that a remand for further consideration of the Warden's contention will accomplish is additional needless delay.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

MICHAEL E. MOORE
Solicitor General
Counsel of Record

GORDON W. SMITH
Associate Solicitor General

JENNIFER L. SMITH
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 20207
Nashville, Tennessee 37202
(615) 741-3491